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Supreme Court of the United States

OCTOBER TERM, 1949

No. 161

HENRY D. GREEN, DOING BUSINESS AS GREEN HARVESTER AND IMPLEMENT CO., PETITIONER,

versus

ALLIS-CHALMERS MANUFACTURING CO., RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

It is respectfully submitted that this Honorable Court should not entertain the petition herein for the following reasons:

1. The Court of Appeals properly held that the order of June 20, 1945, was outside the contemplation and terms of the dealer agreement and furnished no basis for recovery, and it properly, and consistently therewith held that the District Judge erred in charging the jury, at variance with that correct conclusion, that the defendant in the trial

court would be liable to petitioner if he were in anywise prejudiced by its allocations of equipment.

2. The decision of the Court of Appeals does not furnish grounds for review on a writ of *certiorari* within the purport of Rule 38, §5(b), of the Rules of this Honorable Court.

STATEMENT

Respondent's objections to the Statement supplied by Petitioner as "Summary Statement of the Matter Involved" are largely concerned with omissions.

Henry D. Green's representation of Allis Chalmers Manufacturing Co. had its origin in the contract year 1938-1939. His sales of farm machinery for that period were 67 items. In 1940 he sold 172 items of equipment; in 1941, 142; in 1942, 79; in 1943, 35 and in 1944, 60.

When notified by letters of June 6, 1945 and June 18, 1945, that his dealer agreement expiring November 1, 1945, would not be renewed and that he should make his plans for the future accordingly, Green retaliated by sending to respondent an order dated June 20, 1945, for almost one million dollars' worth of farm equipment, aggregating 2,839 items which would have filled 158 1/2 railroad cars. This was at a time when the war with Japan was still in progress, production was controlled, and there was a great scarcity of farm machinery. The small amount then being manufactured was allotted to dealers under a system or pattern which took into account their past sales and was basically proportional. Petitioner was one of 88 dealers in North Carolina, South Carolina and part of Virginia, comprising the territory served by respondent's office known as the Charlotte branch. The total value of all items of the kind included in Green's $927,500.58 order which were avail-

able and distributed to those 88 dealers between June 20, 1945, the date of his order, and November 1 of the same year, when his agreement expired, was $364,034.67. The record is replete with evidence of petitioner's knowledge of the shortage of farm machinery at the time of his order, and of his participation in the system under which it was being distributed.

Subsequent to the date of his order, and until his dealer agreement terminated, petitioner continued to accept allocations which amounted in that period to $6,810.66.

At the conclusion of all the testimony, respondent (defendant below) moved for the direction of a verdict in its favor on the grounds that there was no enforceable contract between the parties requiring the filling of the order of June 20, 1945, that petitioner (plaintiff below) had failed to prove that the dealership agreement encompassed any such order, that petitioner accepted the allocations made to him as a substitute for performance, and lastly, that all the testimony conclusively showed that under the terms of the dealership agreement it was excused from making deliveries up to November 1, 1945, after which it had no further obligation. (R. pp. 87-88.)

This motion was overruled, and following the jury's verdict of $3,587.76, a motion for judgment notwithstanding the verdict was likewise overruled. (R. pp. 109-125.)

It was the failure of the Court below to direct a verdict for respondent upon the grounds made that was the subject of the appeal prosecuted to the Court of Appeals.

SUMMARY OF ARGUMENT

I. The Petition and Supporting Brief Misinterpret the Decision of the Court of Appeals.

II. Jurisdiction Should not be Entertained by This Honorable Court

(1) Because the Court of Appeals examined the evidence, properly applied the law thereto and drew the only reasonable conclusion. Right to trial by jury was not thereby violated.

(2) Because the decision of the Court of Appeals does not furnish grounds for review on a writ of *certiorari.*

ARGUMENT

I

The Petition and Supporting Brief Misinterpret the Decision of the Court of Appeals

It is submitted at the outset that petitioner has a fundamental misconception of the paramount question involved in this action. Petitioner apparently asserts that the paramount question is: did the Court of Appeals erroneously consider and decide a question of fact in arriving at its conclusion; whereas, the primary question presented and decided was whether the order of June 20, 1945, furnished a basis of recovery as a matter of law.

Petitioner makes no attack upon the basis of the decision of the Court of Appeals: that the order was outside the contemplation and terms of the dealership agreement. Rather, he mistakes a part for the whole and assails the correctness of two minor and inconsequential supports of the firm structure of the opinion; and, even in these minor particulars, we submit that he fails to point to error.

Under "Questions Presented" (Petition, p. 8) the Court of Appeals is charged with error in reversing the judgment on the ground "that the order was not given in good faith and was not authorized by the contract", but petitioner says at the same place that the error is "that whether or not the order **was placed in good faith**" was a jury question, and that on that point he has been deprived of a trial by jury. He completely glosses over, and charges no error in the holding that the order "**was not authorized by the contract.**"

The facts set forth in these excerpts from the opinion of the Court of Appeals are undisputed:

> "The plaintiff * * * was * * * one of 88 dealers in the Charlotte area who were familiar with the plan (of distribution, interpolated) and operated under it. * * *"
>
> "* * * plaintiff in his testimony admitted that the knowledge that he would not represent the company after the expiration of his pending dealership contract influenced him in sending the order.
>
> "The size of the order was not only unprecedented but it was so great that the plaintiff could have had no reasonable expectation that the company would be able to fill it without depriving other dealers in the Charlotte branch of their fair share of deliveries, or in other words, without completely changing the company's method of doing business."
>
> * * *
>
> "In view of these facts, it is obvious that there is no reasonable ground for the contention that the plaintiff believed that his order was in accordance with the priority system which limited all of the company's deliveries, or that the company would be able to fill it.
>
> * * *
>
> "* * * This refusal to honor the order was entirely justified, for it called for goods far in excess of

> the plaintiff's fair share * * * and far more than the plaintiff had any reason to expect the company to deliver."
>
> * * *
>
> "* * * the order which he applied for was one obviously beyond the power of the company to fulfill * * * there was the corresponding obligation upon the dealer to exercise good faith within the confines of the contract. The order of June 20, 1945, *was so far outside the dealer's agreement* that in legal significance it constituted merely an offer to enter into a new contract that the company had a perfect right to reject." (Emphasis added.)

The conclusions based upon the foregoing facts are crystal clear. No other reasonable inference could be drawn: the order was submitted with full knowledge that under the stringencies attendant upon the war, it could not be filled. It was so far outside the contract, as emphasized in the preceding quotation, that the company had a perfect right to reject it.

On undisputed facts as to the circumstances existing at the time of the order and the method of doing business then subsisting between the parties, the dealer agreement and order both being in writing, it was not only the right but the duty of the trial Court, and, this position being maintained, of the appellate Court, to determine whether the order was within the contemplation of the agreement, before any evidence thereabout was left to the jury. In reaching its ultimate conclusion that "the order of June 20, 1945, furnishes no basis for recovery in this case" the Court of Appeals clearly and correctly discharged such duty, for having determined as a matter of law that the order furnished no basis for recovery, there was left no evidence upon which the jury could properly proceed to find a ver-

dict. *Gunning v. Cooley,* 281 U. S. 90, 94, 50 S. Ct., 231, 74 L. Ed. 720.

The fallacy of petitioner's contention that there was a conflict in the evidence lies in the fact that any such conflicts are collateral to, and do not affect, the very crux of the case.

Almost a corollary to what has been said in the foregoing discussion is our position in reference to petitioner's second assertion of error, that the Court of Appeals should not have reversed the judgment below on the basis of the Trial Judge's charge. (Petition, pp. 8 and 9.) While it is true that specific exception was not made to such portion of the charge, in fairness to respondent it should be pointed out that its position had been fully covered in argument for the direction of the verdict in its favor, and when asked if there were exceptions, our reply was that our views had been stated, and need not again be detailed. (Reporter's Tr., R. p. 108.) Not even on appeal did respondent assert error in the charge, because if correct in its position that there should have been a directed verdict in its favor, it mattered not what was charged the jury—**error in the charge to the jury was rendered academic.** Assuming the correctness of our position with respect to a directed verdict, any charge at variance with such position would have been erroneous.

It should here be pointed out that any application of *Acme Mfg. Co. v. Arminius Chemical Co.,* 264 Fed. 27, 275 Fed. 1021, (cert. den. 257 U. S. 647, 66 L. Ed. 415, 42 S. Ct.), cited in petitioner's brief at p. 23, is likewise precluded by the same reasoning: it does not inveigh against the soundness of our position, that the order as a matter of law was outside the dealer agreement. Had the Court of Appeals decided in favor of respondent upon the point, also

presented to it, that the testimony conclusively established that, by reason of the shortage of materials and the observance of a voluntary priority or allocation system, it was excused under the terms of the dealer agreement from making deliveries of the items ordered, then the *Acme case* might have had some application, although we think not.

The portion of the charge which the Court of Appeals held to be error was not the fundamental error for which it reversed. That error was the failure of the District Judge to hold that the order was outside the dealer agreement and so furnished no basis for recovery. The questioned portion of the charge was held to be error merely because it allowed the jury to permit a recovery where as a matter of law no recovery could be had.

To illustrate our point in sharp outline, we suggest that the opinion of the Court of Appeals be considered with all discussion of and ruling on the charge expunged and eliminated. There still remains unimpaired (and unchallenged) a cogent opinion, reversing because of error in not directing the verdict for the respondent.

The opinion of Judge Soper is meticulously correct, and it accords with all applicable principles of law.

II

Jurisdiction Should Not Be Entertained

1. The Court of Appeals properly examined the evidence and drew the only reasonable inference to be derived therefrom. Right to trial by jury is not thereby violated.

We have hereinabove reviewed the evidence and have fully demonstrated, we believe, that there was no substantial basis for submission of the case to the jury. As we have heretofore pointed out, the Court of Appeals in re-

versing the judgment of the District Court, merely applied the established rule that a verdict should be directed when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, leads to but one conclusion. Obviously the power and duty of the Court so to declare the law is not in conflict with the Seventh Amendment to the United States Constitution and the right to trial by jury is not thereby violated. *Galloway v. U. S.*, 320 U S. 214, 63 S. C. 1443, 87 L. Ed. 1851. Cf. Concurring Opinion of Mr. Justice Frankfurter in *Wilkerson v. McCarthy*, 336 U. S. 53, decided January 31, 1949.

As to Authorities Cited by Petitioner

(a) Supreme Court Decisions

Petitioner cites and lays stress on two recent cases from this Court: *Lavender v. Kurn et al.*, 327 U. S. 645, 66 S. Ct. 740, and *Tennant v. Peoria and Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520, 525. In each of these cases it was merely held that courts (including appellate courts) are not free to reconsider the evidence and set aside a jury's verdict merely because the jury could have drawn different inferences or conclusions, or because judges feel that other results are more reasonable. In the instant case the Court of Appeals did not violate the rule laid down in the *Lavender* and *Tennant cases, supra*. On the contrary, and as has already been pointed out in this brief, the Court of Appeals merely concluded that there was only one reasonable inference to be drawn from the undisputed testimony. Hence the decision was in accord with the established rule that a verdict should be directed when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, leads to but one conclusion. *Gunning v. Cooley, supra*; *Brady v. Southern Ry. Co.*, 323 U. S. 600, 64 S. Ct. 232, 88 L. Ed. 239. We scarcely think

that the petitioner would seriously contend that either the *Lavender* or *Tennant cases* overruled or intended in any way to change this well-established rule. In fact the *Lavender case* states the present rule conversely when it says:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." (327 U. S. 645, at page 653, 66 S. Ct. 740, 744).

(b) South Carolina Decisions

Petitioner cites several South Carolina cases which merely hold that a verdict is not to be set aside except where there is no substantial evidence to support it. These cases are in accord with the rule announced by this Honorable Court in the *Tennant* and *Lavender cases, supra.* The decision of the Court of Appeals in this case is not in conflict with that rule because the established rule in South Carolina is the same as that upon which the Court of Appeals based its judgment of reversal in this case and that is that where the undisputed evidence and all inferences that the jury could justifiably draw therefrom, leads to but one reasonable inference, there is no question of fact for the jury to decide and the Court has not only the power but the duty to declare what such reasonable inference is. *National Bank of Honea Path et al. v. Barrett & Co. et al.,* 173 S. C. 1, at page 5, 174 S. E. 581, 582; *Radcliff v. Southern Aviation School et al.,* 209 S. C. 411, at page 419, 40 S. E. (2d) 633.

2. The decision of the Court of Appeals supplies no adequate grounds for review by certiorari.

Although the petition makes plenary charges of conflict and confusion, these charges are without foundation.

Petitioner's rights under the Seventh Amendment have not been violated, under the authority of the *Galloway* and *Brady cases, supra.*

The *Lavender* and *Tennant cases,* relied on by petitioner, merely preclude the trial or appellate court from substituting its judgment for that of the jury when facts are present justifying a verdict. It should be borne in mind that in these federal employers liability cases a federal statute, and hence a federal right, is involved. In this class of cases it is of importance to the public, as well as to the litigant, that a uniform federal rule be followed as to the necessary amount of evidence essential to require the submission of the issue as to the liability of the Railroad Company to the jury. Cf. *Brady v. So. Ry. Co., supra,* and the concurring opinion of Mr. Justice Douglas in *Wilkerson v. McCarthy, supra.* There is no such right and no such public interest inherent in the instant case.

In the light of the foregoing, a reading of Rule 38 of this Court, and more particularly of §5(b), will lead to the conclusion that "special and important reasons" do not here exist for the granting of the writ of *certiorari.*

The decision of the Court of Appeals, whether from the standpoint of result or precedent, is isolated, and involves no principle the settlement of which is of importance to the public as distinguished from that of the parties and hence furnishes no basis for the granting of the writ of *certiorari* under §5(b) of Rule 38. *Lane & Bowler Corp. v. Western Well Works,* 261 U. S. 387, 393, 67 L. Ed. 712, 714. It is not probable that the facts will again be duplicated, and basically petitioner is asking this Court to review and weigh the facts. Time and again this Court has held that the granting of the writ is not warranted merely to review the evidence or inferences drawn from it. To cite a few instances:

General Talking Pictures Corporation v. Western Electric Company, Inc., 304 U. S. 175, 546, 58 S. Ct. 849, 82 L. Ed. 1273; *United States v. Johnston*, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925; *Southern Power Co. v. North Carolina Public Service Co. et al.*, 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413.

CONCLUSION

In conclusion respondent urges that the decision of the Court of Appeals followed Constitutional and accepted procedure and arrived at the only conclusion authorized by the evidence; that petitioner has pointed to no decision, State or Federal, with which the decision is in conflict; that the law was clearly and correctly applied to the facts established by the evidence; and that accordingly the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

S. AUGUSTUS BLACK,

EDWARD W. MULLINS,

Columbia, S. C.

Attorneys for Respondent.

OF COUNSEL:

H. W. STORY,

JOHN B. BAKER,

Milwaukee, Wis.